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In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

ALPINE RIDGE GROUP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit's holding that an Act of Congress is unconstitutional warrants this Court's review. Contrary to respondents' contentions, more is at stake than a simple contract issue and a well-worn application of the Due Process Clause. This case implicates the terms on which HUD must do business with thousands of Section 8 project owners every year. Moreover, if the court of appeals correctly interpreted the Section 8 contracts, this case raises important and unsettled questions about the substantive due process limits on Congress's power to modify contractual rights in federal programs.

1. Respondents contend (Acacia Br. in Opp. 1-2, 5) that the proper interpretation of the Section 8 contracts is not

worthy of this Court's review. As our petition explains, however, the constitutional issue the court of appeals decided arises *only if* respondents had the contract right they claim—the right to prevent HUD from using individualized comparability studies as a separate cap to formula-based rent adjustments. Pet. 11-12. The court of appeals held that Section 801 of the Department of Housing and Urban Development Reform Act of 1989 is unconstitutional because it "abrogates the owners' vested property rights in violation of the fifth amendment." Pet. App. 14a. That holding is clearly wrong if the owners lacked such "vested property rights." It is for that reason that the contract issue merits this Court's attention.

The Court has repeatedly stated that the declaration that an Act of Congress is unconstitutional "is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). When a case may be decided on a non-constitutional ground, it is this Court's settled practice to avoid the resolution of the constitutional issue. *E.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The court of appeals in this case did not pause to examine whether respondents are entitled to the contract rights they assert, instead relying solely on its interpretation of the contract in *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989). The three courts outside of the Ninth Circuit that have examined the issue independently, however, have each determined that *Rainier View*'s interpretation of the Section 8 contract is wrong.[1] If this Court were to agree, it would become

[1] See *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683, 687 (W.D. Pa. 1992), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.); *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.). In all three cases, the courts held that Section 801 is constitutional because Section 8 project owners never had the right to be free from the use of comparability studies as a separate cap to rent increases. Accordingly, those courts concluded that Section 801 does not infringe contract rights. In defending the Ninth Circuit's approach, respondents ignore these decisions and their reasoning.

apparent that the court of appeals' invalidation of an Act of Congress rests on a deeply flawed premise.

2. Respondents' defense of the *Rainier View* reading of the Section 8 contracts is remarkable for its avoidance of the language of the contract. In arguing that HUD must grant adjustment factor increases without application of a separate comparability cap, the Acacia respondents never refer to the "overall limitation" provision of the contract, which expressly states that "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government." HAP Contract, § 1.9d. Instead, respondents rely on "background facts," "real life context," and "attitudes of the *Acacia Villa* owners" to support their assertion that project owners had a settled expectation that rents would be "adjusted by multiplying the previous year's rent by a published inflation factor" and that there would be no "case-by-case rent adjustments." Acacia Br. in Opp. 2, 4, 12; see Alpine Br. in Opp. 2-3.

The right approach, however, is to read the plain language of the contract, and that language—supported by the Secretary's regulations and the statute—establishes that HUD can apply a comparability cap to a particular project when the published adjustment factor would result in "material differences between the rents charged for

assisted and comparable unassisted units." HAP Contract, § 1.9d; 24 C.F.R. 880.609(c); 42 U.S.C. 1437f(c)(2)(C) (1982); Pet. 13-17. Indeed, prior to this litigation, representatives of the housing industry acknowledged that comparability studies *would* serve as a cap to formula-based increases. In 1984, Charles L. Edson, counsel to the National Leased Housing Association, testified to a congressional committee that

> in structuring section 8, Congress meant it to be a market program. Rents would rise by either the fair market rents in the area, or a reasonable formula * * *, *but there was a cap, a market discipline cap, and that is where comparabilities came in. Rents could not exceed the rents of a comparable project in the area.*[2]

In meetings around the country, HUD explained to prospective Section 8 developers that rents would rise based on "the market index capped only by comparability."[3] The contention voiced by respondents now—that they had a legitimate expectation that the Adjustment Factors would apply automatically and without regard to the results of comparability studies for a particular project—is therefore unfounded.[4]

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[2] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 21 (1984) [1984 House Hearings] (emphasis added).

[3] 1984 House Hearings, *supra* at 21.

[4] Respondents also criticize HUD's manner of conducting comparability studies (see Acacia Br. in Opp. 8; Alpine Br. in Opp. 16-17), but this case presents no issue as to whether the particular procedures employed by HUD in conducting comparability studies were administratively reasonable. Rather, it involves only the general issue of whether HUD had authority under the contracts to use the results of comparability studies to cap formula-based adjustments.

The Alpine Ridge respondents devote much of their argument (Br. in Opp. 7 n.12, 11-19) to the claim that HUD's "real purpose" in using comparability studies was to erase differentials between contract rents and rents at comparable unassisted projects established in the original agreements. That contention is wrong. As both HUD's regulations and the contract make clear, the comparability cap explicitly preserves "differences [that] existed with respect to the contract rents set at Contract execution or cost certification." 24 C.F.R. 880.609(c); HAP Contract, § 1.9d (overall "limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents").[5] Comparability studies thus served, not to eliminate the original differential, but to protect against excessive rent increases in light of local market conditions.[6] In claiming

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[5] Suppose, for example, that in 1980 the original contract rent were set at $350, while rents at a comparable project were $320. HUD's process for granting rent increases preserved that $30 differential. As HUD explained in a 1986 memorandum, it applied the comparability cap only when the Adjustment Factor produced a *materially* different rent increase from a comparability study, and "[a] material difference exists whenever the adjusted Section 8 rent would *exceed* 120 percent times the sum of the comparable rent and the initial difference." *National Leased Housing Ass'n*, 22 Cl. Ct. at 661. Therefore, under that approach, if the results of a comparability study in 1984 indicated that rents at comparable projects were $330, the cap would be 120% times the sum of $330 *plus the initial difference of $30*, producing a rent cap of $432. The initial difference was thus preserved under HUD's methodology; Alpine's position goes far beyond preserving the initial difference and insists on payment of the full Adjustment Factor increase, even if it produced rents of $450, $500, or $550.

[6] Local market conditions often varied substantially from the general Adjustment Factor increases because Adjustment Factors were computed only for 74 metropolitan areas and the four Census Regions. All projects within a Census Region were governed by the same Adjustment Factor if they were not in one of the 74 metropolitan areas.

that the Adjustment Factors must be applied automatically, respondents assert nothing less than the right to keep such excessive rent increases.

3. In discussing the constitutional issue, respondents, like the court of appeals, treat this case as though it is on all fours with *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). Alpine Br. in Opp. 20; Acacia Br. in Opp. 10. It is not.

a. This case involves a claimed contractual right to a *process* for computing rental increases. No decision of this Court has held that such a process is immune from legislative revision. At issue in *Lynch* was the right to payment of specific insurance benefits; at issue in *Perry* was the right to payment on a government bond. This case involves rights of a different character. Respondents do not claim that they had a contract right to any specific rent increase. They do not even contend that HUD was barred from using comparability studies as a means of modifying rent increases. Their contention is limited to the proposition that HUD could use comparability studies only in modifying the factors used to produce the adjustment formula, rather than as an independent rent-adjustment cap. See *National Leased Housing Ass'n*, 22 Cl. Ct. at 662.

The right respondents assert is therefore a right to a particular process for adjusting rents. This Court has never held, however, that parties contracting with the government have a substantive due process right to be free from modifications in procedures. It would be particularly

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Thus "the depressed markets that prevailed in the Pacific Northwest during the early 1980s" would have received the same increase as "the hyperinflated housing markets of southern California." HUD, *Report to Congress on the Adjustment of Contract Rents Under Section 8(c)(2)(C) of the United States Housing Act of 1937*, at 7 (July 27, 1990). HUD used comparability studies as caps to avoid such unjustified results.

wrong to find a protected right to the procedures here, because respondents had no expectation that the financial results under their approach would be any different from HUD's approach. Under everyone's reading of the contract, HUD had an obligation to avoid "material differences" between assisted and comparable unassisted units; the only issue is *how* HUD reached that result. But "[w]hichever methodology is employed, the rent adjustment, in effect, would be based on the same comparability study and the amount of the rent adjustment should be the same." *National Leased Housing Ass'n*, 22 Cl. Ct. at 662.[7]

b. In our petition, we argue that Section 801 is valid as "curative" legislation, designed to remedy the unexpected decision in *Rainier View*, and is supported by valid legislative purposes other than saving the government money. Pet. 17-20, 21-22. Respondents barely respond to our reliance on decisions upholding "curative" legislation. Acacia contends that Congress can correct mistaken decisions only when they affect "benefits gratuitously conferred," while Alpine asserts that Congress may act only to modify "[u]nliquidated claims." Acacia Br. in Opp. 11; Alpine Br. in Opp. 20. But this Court has upheld curative legislation cutting off a "vested" claim to a tax

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[7] The district court explained that point in *Carmichaels Arbors*: "[T]he overall limitation provision almost seems to require that HUD undertake some sort of market survey to determine whether a material difference exists. * * * And once it is conceded that HUD can undertake a market survey to decide whether a material difference exists, it is oddly formalistic to require that HUD recalculate the [Adjustment Factors] to arrive at a number that is not materially different from the number produced by the market survey. *By definition, the number will not be materially different.*" 789 F. Supp. at 689 (emphasis added). Acacia does not seriously dispute that conclusion. Acacia Br. in Opp. 12. Alpine does dispute it, but that is only because of Alpine's impression that comparability studies fail to preserve "the initial relationship of contract rents to the market." Alpine Br. in Opp. 7 n.12. As we explain, see p. 5, *supra*, that impression is wrong.

benefit, *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931), and the rationale of the "curative legislation" cases is fully applicable here. Until *Rainier View* it was thought by HUD, Congress, and the housing industry itself (see p. 4, *supra*) that comparability caps were legitimate. Congress acted responsibly, and constitutionally, in moving quickly to reestablish the permissibility of comparability caps.

Respondents also echo the court of appeals' assertion that Congress's sole purpose in enacting Section 801 was to save the government money. Acacia Br. in Opp. 12-14; Alpine Br. in Opp. 21. The proper approach in evaluating the constitutionality of social and economic legislation, however, is not to assume the worst; it is to uphold the legislature's action if a legitimate basis for the law may "conceivably" have been the purpose of the legislature. *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2334 (1992); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). Here, not only is it conceivable that Section 801 served legitimate purposes, the statements of Section 801's sponsors describe several such purposes: the law was designed to put an end to wasteful disputes over the manner of granting rent increases in the Section 8 program; to eliminate uncertainty that could hinder the program's objective of providing low-income housing; and to restore the program's market-rent premise. Pet. 8 n.4. In branding Congress's action solely as an economy measure, the court of appeals ignored the law's more general purpose to strengthen the Section 8 low-income housing program.

These constitutional questions warrant this Court's review. The issue here involves thousands of Section 8 contracts and implicates many millions of dollars in government payments. Project owners around the country are actively litigating the constitutionality of Section 801, while HUD is taking steps to implement the

law's mandate.[8] As industry representatives are well aware, the pendency of this dispute has disrupted the smooth operation of the Section 8 program. See National Leased Housing Ass'n, et al., Amici Br. 3-6 (urging the Court to grant certiorari to ensure uniform treatment of project owners nationwide). Until this issue is definitively resolved, the stability, predictability, and efficiency of the Section 8 program will be undermined.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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[8] HUD has recently issued proposed regulations to govern the process of conducting and using comparability studies. See HUD, *Annual Adjustments of Contract Rents for Section 8 Assisted Housing; Comparability Studies*, Docket No. R-92-1602; FR-2822-P-01, 57 Fed. Reg. 49,120 (Oct. 29, 1992).